Order Code RS22130
April 28, 2005

Detention of U.S. Citizens

Louis Fisher
Senior Specialist in Separation of Powers
Government and Finance Division

Summary

In 1971, Congress passed legislation to repeal the Emergency Detention Act of 1950 and to enact the following language: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." The new language, codified at 18 U.S.C. §4001(a), is called the Non-Detention Act. This statutory provision received attention after the 9/11 terrorist attacks when the Administration designated certain U.S. citizens as "enemy combatants" and claimed the right to detain them indefinitely without charging them, bringing them to trial, or giving them access to counsel. In litigation over Yaser Esam Hamdi and Jose Padilla, both designated enemy combatants, the Administration has argued that the Non-Detention Act restricts only imprisonments and detentions by the Attorney General, not by the President or military authorities. For more detailed analysis, see CRS Report RL31724, *Detention of American Citizens as Enemy Combatants*, by Jennifer K. Elsea. This report will be updated as events warrant.

Emergency Detention Act

In 1950, Congress passed the Internal Security Act to require Communist and Communist-front organizations to register with the Attorney General. Title II of the statute was called the "Emergency Detention Act." Any person the Administration determined would probably commit espionage or sabotage could be detained if the President declared the existence of an "internal security emergency." Individuals detained would be given a preliminary hearing before an officer in the executive branch, but the statute authorized the Attorney General to decline to furnish information that would reveal the identity of special agents. Six detention camps were established but never used.

In 1971, Congress passed legislation to repeal the Emergency Detention Act of 1950 and to enact new language reading: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." P.L. 92-128, 85 Stat. 347 (1971). The new language, codified at 18 U.S.C. § 4001(a), is called the "Non-Detention Act."

Report Documentation Page

Form Approved
OMB No. 0704-0188

1. REPORT DATE	2. REPORT TYPE	3. DATES COVERED
28 APR 2005	**N/A**	**-**

4. TITLE AND SUBTITLE	5a. CONTRACT NUMBER
Detention of U.S. Citizens	5b. GRANT NUMBER
	5c. PROGRAM ELEMENT NUMBER
6. AUTHOR(S)	5d. PROJECT NUMBER
	5e. TASK NUMBER
	5f. WORK UNIT NUMBER
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) **Congressional Research Service The Library of Congress 101 Independence Ave SE Washington, DC 20540-7500**	8. PERFORMING ORGANIZATION REPORT NUMBER
9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)	10. SPONSOR/MONITOR'S ACRONYM(S)
	11. SPONSOR/MONITOR'S REPORT NUMBER(S)

12. DISTRIBUTION/AVAILABILITY STATEMENT
Approved for public release, distribution unlimited

13. SUPPLEMENTARY NOTES

14. ABSTRACT

15. SUBJECT TERMS

16. SECURITY CLASSIFICATION OF:			17. LIMITATION OF ABSTRACT	18. NUMBER OF PAGES	19a. NAME OF RESPONSIBLE PERSON
a. REPORT	b. ABSTRACT	c. THIS PAGE			
unclassified	**unclassified**	**unclassified**	**SAR**	**6**	

Standard Form 298 (Rev. 8-98)
Prescribed by ANSI Std Z39-18

In litigation after the terrorist attacks of 9/11, the Administration has argued that Section 4001(a) "does not apply to the military's wartime detention of enemy combatants." Respondent's Opposition to the Motion for Summary Judgment, *Padilla* v. *Hanft*, Nov. 22, 2004 (D.S.C.), at 20. By the Government's analysis, Section 4001(a) "has no bearing on the military's authority to detain enemy combatants in wartime," in part because Section 4001(a) was a separate enactment "to an existing provision in United States Code Title 18 ('Crimes and Criminal Procedure') rather than Title 10 ('Armed Forces') or Title 50 ('War and National Defense')." Id. at 29. The Government states that the existing provision "was directed to the Attorney General's control over federal prisons; its terms, which remain unchanged, stated that the 'control and management of Federal penal and correctional institutions, *except military or naval institutions*, shall be vested in the Attorney General.'" Id. (emphasis in original).

In order to accept this analysis, one would have to believe that Congress, in 1971, intended to limit imprisonment or detention by civilian authorities (unless specifically authorized by Congress), but allow military authorities to imprison or detain without an Act of Congress. The legislative history does not support that interpretation, which would leave open some inherent presidential power to accomplish the same feat by military means.

Urban Riots of the 1960s

The purpose of Section 4001(a) is clarified by an understanding of the political pressures that emerged with the urban riots that spread across the nation after 1964. In signing the Non-Detention Act of 1971, President Richard M. Nixon explained that the Administration was "wholeheartedly" in support of the repeal of the Emergency Detention Act, and he wanted "to underscore this Nation's abiding respect for the liberty of the individual. Our democracy is built upon the constitutional guarantee that every citizen will be afforded due process of law. There is no place in American life for the kind of anxiety — however unwarranted — which the Emergency Detention Act has evidently engendered." *Public Papers of the Presidents*, 1971, at 986. His statement appears to cover both domestic and military detention, for it would do little to alleviate anxiety if individuals and groups knew they were vulnerable to detention by military authorities.

President Nixon added: "This strong country has no reason to fear that the normal processes of law — together with those special emergency powers which the Constitution grants to the Chief Executive — will be inadequate to deal with any situation, no matter how grave, that may arise in the future." Id. He did not elaborate on the "special emergency powers" available from the Constitution rather than from statutes. Did his additional remark suggest that, under the constitutional power as Commander in Chief, the President could order the military to arrest and detain individuals and groups without statutory authority? Such a claim would conflict with his promise that "every citizen will be afforded due process of law." The legislative history of the Non-Detention Act, set forth in subsequent sections of this report, offers no support for the proposition that the President could use the military to detain U.S. citizens.

Congress acted legislatively in 1971 under pressure from two sources. In 1968, the Japanese American Citizens League, with more than 25,000 members and 92 chapters in 32 states, spearheaded a nationwide drive to repeal the Emergency Detention Act. 117 Cong. Rec. 31535 (statement of Representative Evins). Second, in 1968, the House

Committee on Un-American Activities submitted a report that recommended the possible use of camps to detain certain black nationalists and Communists. H.Rept. No. 1351, at 59 (1968); S.Rept. No. 91-632, at 3 (1969) (letter of Senator Inouye).

It was in this climate that Deputy Attorney General Richard G. Kleindienst wrote to the Senate Committee on the Judiciary in 1969, recommending repeal of the Emergency Detention Act. He explained, "In the judgment of this Department, the repeal of this legislation will allay the fears and suspicions — unfounded as they may be — of many of our citizens." S.Rept. No. 91-632, at 4 (1969). Leaving citizens vulnerable to military detention would not allay those fears and suspicions.

In 1969, the Senate passed legislation to repeal the Emergency Detention Act. Senator Daniel Inouye, who introduced the bill, said he became "aware of the widespread rumors circulated throughout our Nation that the Federal Government was readying concentration camps to be filled with those who hold unpopular views and beliefs. These rumors are widely circulated and are believed in many urban ghettoes as well as by those dissidents who are at odds with many of the policies of the United States. Fear of internment, I believe, lurks for many of those who are by birth or choice not 'in tune' or 'in line' with the rest of the country." 115 Cong. Rec. 40702 (1969). The Senate passed the bill by voice vote. Id.

The House did not act on the Senate bill. Instead, the House Committee on Internal Security (formerly the House Committee on Un-American Activities) reported legislation in 1970 to amend certain provisions of the Emergency Detention Act "so as to relieve any misapprehension as to the circumstances in which is may be applied . . . [M]isinformation regarding the terms and possible application of the act, by which it is made to appear that the title would authorize the establishment of 'concentration camps' for the incarceration of racial groups, has received wide dissemination within recent years." H.Rept. 91-1599, at 1 (1970). As part of the amendments, the committee proposed adding this language: "No citizen of the United States shall be apprehended or detained pursuant to the provisions of this title on account of race, color, or ancestry." Id. at 17. The dissenting view of Representative Louis Stokes in this report said that the new language would no nothing "to quash the fears and rumors in the black community." Id. at 23.

Restricting Both Civilian and Military Authorities

The legislative history of Section 4001(a) underscores the intent of Congress to limit all government power, whether exercised by civil or military authorities. In 1971, the House Committee on Internal Security again reported a bill to amend the Emergency Detention Act. H.Rept. No. 92-94 (1971). However, the House was moving in the direction of the Senate bill and chose to repeal, rather than amend, the Emergency Detention Act. Initially, the House Judiciary Committee adopted an amendment by Representative Spark Matsunaga, stating: "No person shall be detained except pursuant to title 18." 117 Cong. Rec. 31755 (statements by Representatives Ichord and Railsback). As explained below, the Justice Department advised Congress that the power of government to detain individuals is not limited to Title 18, but appears in other Titles of the U.S. Code.

As a consequence, the House Judiciary Committee reported legislation to repeal the Act and to add this language to Title 18: "No citizen shall be imprisoned or otherwise

detained by the United States except pursuant to an Act of Congress." H.Rept. No. 92-116, at 1 (1971). Nothing in the report implies that the provision on imprisonment and detention applied only to civilian authorities (covered by Title 18) and indirectly or by implication recognized an independent power by the President or the military to imprison or detain. The committee was responding to the political situation described by Assistant Attorney General Robert Mardian in his testimony. He said that the Justice Department was "unequivocally in favor" of repealing the Emergency Detention Act, and reminded the committee of a letter written by Deputy Attorney General Kleindienst, who regarded continuation of the Act as "extremely offensive to many Americans. In the judgment of this Department, the repeal of this legislation will allay the fears and suspicions — unfounded as they may be — of many of our citizens." Id. at 3. Those fears and suspicions would not be allayed if military authorities possessed independent power to imprison and detain U.S. citizens suspected of posing a danger to national security.

The committee left unchanged the following language as part of Section 4001: "The control and management of Federal penal and correctional institutions, except military or naval institutions, shall be vested in the Attorney General . . . ." Id. at 6. The Government interprets the exception clause as support for military imprisonment and detention, but the exception merely recognizes that the Attorney General's jurisdiction does not cover military or naval institutions. The exception clause did not sanction military detentions.

During House debate, several Members acknowledged that Congress was about to place limits not merely on the Attorney General but also on the President and the military. Representative H. Allen Smith expressed concern that the proposed legislation would interfere with the kind of emergency actions taken by President Roosevelt immediately after Pearl Harbor, including taking aliens into custody. In 1942, Roosevelt also ordered the curfew and detention of Japanese-Americans without first receiving statutory authority. Smith supported the repeal of the Emergency Detention Act but objected strongly to adding new language: "[I]f the President were absolutely handicapped by this language that no citizens shall be imprisoned or otherwise detained by the United States except pursuant to an act of Congress, what could he possibly do if there were an emergency?" 117 Cong. Rec. 31536. The Justice Department, however, had testified to Congress that "[t]here is a considerable amount of statutory authority to protect the Internal Security interests of our country from sabotage and espionage or other similar attacks." Id.

Representative Thomas F. Railsback, who sponsored the language that became Section 4001(a), responded to Smith in this manner: "If we are concerned about what happened in 1942 when there really was not a statute existing upon which the President relied, then we have to do something in addition if we really want to prevent some kind of recurrence of what happened in 1942." Id. at 31537. In this way, Railsback argued that mere repeal of the Emergency Detention Act would not suffice. Only the adoption of new language would prevent the President from detaining U.S. citizens until he received statutory authority.

The question of whether Section 4001(a) was confined to detention by civilian authorities under Title 18 was debated extensively in the House. Representative Abner Mikva recalled that a Justice Department official had testified "very wisely, that many of the provisions that do allow detention and imprisonment appear in other sections than title

18. He made reference to them including 26 and 49, and in response to the Department of Justice opposition to that over extension, the Railsback amendment came into being, which made it very clear that we are not talking about title 18 but any detention authorized by an act of Congress." Id. at 31538.

Representative Robert Kastenmeier, who managed the bill, also spoke of detention and imprisonment authorities outside of Title 18. He referred to testimony from a Justice Department official that it was a mistake to assume "that all provisions for the detention of convicted persons are contained in title 18. He pointed to a number of criminal provisions that appear in other titles; for example, titles 21 — narcotics; 50 — selective service; 26 — internal revenue; and 49 — airplane hijacking." Id. at 31540. Kastenmeier explained why the Railsback Amendment would restrict both civilian and military authorities:

> To alleviate these problems raised by the Department of Justice, the committee recommends an amendment that would take the place of sections 1 and 2. The amendment provides that no citizen shall be imprisoned or otherwise detained by the United States except pursuant to an act of Congress.
>
> In this way, the legislation also avoids the pitfalls that might be created by repealing the Detention Act by leaving open the possibility that people might nevertheless be detained without the benefit of due process, merely by executive fiat.
>
> In other words, the requirement of legislation authorization would close off the possibility that the repeal of the Detention Act could be viewed as simply leaving the field unoccupied. It provides that there must be statutory authority for the detention of a citizen by the United States. Existing detention practices are left unaffected. Incarceration for civil and criminal contempt, and detention of mental defectives, for example, are already covered by statutes. Id. at 31541.

Instead of identifying all the Titles of the U. S. Code that authorize imprisonment and detention, the committee decided to replace the original sections 1 and 2 with a single provision: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an act of Congress." Id. (Representative Richard Poff). The political climate of the Non-Detention Act (fear and anxiety by U.S. citizens of arbitrary imprisonment and detention) combined with the legislative history provide persuasive evidence that the purpose of repealing the Emergency Detention Act and adding the Railsback Amendment was to strip from the executive branch — both its civilian and military components — of any claim of independent authority to round up, imprison, and detain disfavored individuals or groups.

Limiting Executive and Presidential Actions

The constitutional protections of due process apply fully to the Administration because Section 4001(a) limits not merely the authority of the Attorney General over civilian institutions, under Title 18, but also more generally *executive* and *presidential* actions. Kastenmeier emphasized that "[r]epeal alone might leave citizens subject to arbitrary executive action, with no clear demarcation of the limits of executive authority." Id. at 31541. Representative Poff noted that the bill's sponsors and the House Judiciary Committee "did not content themselves with a simple repeal of the Emergency Detention Act, because it is far from certain what effect a simple repealer would have on the President's powers to detain persons during an internal security emergency." Id.

Representative Richard Ichord, who opposed the Railsback Amendment, warned that "this most dangerous committee amendment [would] deprive the President of his emergency powers and his most effective means of coping with sabotage and espionage agents in war-related crises. Hence the amendment also has the consequence of doing patent violence to the constitutional principle of separation of powers." Id. at 31542. Railsback's amendment "would deny to the President the means of executing his constitutional duties, and could have the effect of rendering him helpless to cope with the depredations of those hard-core revolutionaries in our midst who, in the event of war, may be reasonably expected to attempt a widespread campaign of sabotage and bloodletting, including the assassination of public officials, in aid of the enemy." Id. at 31544. Representative Lawrence Williams opposed the Railsback Amendment because he did "not want to see the President's hands tied," objecting to language that "would represent an arrogant invasion of the emergency powers of the President." Id. at 31554.

Railsback stated that his amendment "eliminates whatever authority the President would have on his own to establish detention camps except in those cases of emergency when martial law may properly be invoked. . . . Nothing Congress does can affect executive martial-law powers which arise when the processes of government cannot function in an orderly way. For that is truly a 'nonlaw' situation." Id. at 31755.

With the House prepared to repeal the Emergency Detention Act, Ichord urged that the following amendment be adopted in the nature of a substitute for the Judiciary Committee amendment:

> That the prior enactment and repeal herein of provisions of Title II of the Internal Security Act of 1950 (50 U.S.C. 811-826) shall not be construed to preempt, disparage, or affect the powers accorded to or the duties imposed upon the President under the Constitution and other laws of the United States: provided, however, that no citizen of the United States shall be apprehended or detained for the prevention of espionage or sabotage solely on account of race, color, or ancestry. Id. at 31545.

Ichord's amendment failed to pass, the House voting 124 to 272. Id. at 31766-67. An earlier Ichord amendment, to revise some of the provisions of the Emergency Detention act, failed by a vote of 22 to 68. Id. at 31761. After the Judiciary Committee amendment (adapted by Railsback) was agreed to, 290 to 111, the bill passed the House 356 to 49. Id. at 31768, 31781. The Senate passed the House bill by voice vote. Id. at 32145. The Supreme Court has interpreted Section 4001(a) to proscribe "detention *of any kind* by the United States, absent a congressional grant of authority to detain." *Howe* v. *Smith*, 452 U.S. 473, 479 n.3 (1981) (emphasis in original).

Conclusions

Legislative debate, committee reports, and the political context of 1971 indicate that when Congress enacted Section 4001(a) it intended the statutory language to restrict all detentions by the executive branch, not merely those by the Attorney General. Lawmakers, both supporters and opponents of Section 4001(a), recognized that it would restrict the President and military authorities.